

1
UNITED STATES DISTRICT COURT2
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3
MICROSOFT CORPORATION,)
4)
5 Plaintiff,) C10-1823JLR
6 v.) August 23, 2013
7)
8 MOTOROLA, INC., et al.,) TELEPHONIC
9) HEARING
Defendant.)
)

10 BEFORE THE HONORABLE JAMES L. ROBART
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

13
14 For the Plaintiff: Arthur Harrigan, Christopher
15 Wion, David Pritikin, Richard
Cederoth, Andy Culbert and
Ellen Robbins
16
17

18 For the Defendants: Ralph Palumbo, William Price,
19 Brian Cannon, Kathleen Sullivan
and Phillip McCune
20
21
22
23
24
25

1 THE COURT: Good afternoon.

2 MR. PALUMBO: Good afternoon, your Honor.

3 THE COURT: May I have a list of who is going to
4 be speaking for the parties? And I would like to limit it
5 to one or two to each side, please.

6 MR. HARRIGAN: Your Honor, Art Harrigan. I will
7 be the primary speaker for Microsoft. If possible,
8 Ms. Robbins may chime in at some point.

9 MR. PALUMBO: Your Honor, Ralph Palumbo. I have
10 with me here Mr. Price, Ms. Sullivan, Ms. Roberts,
11 Mr. Cannon and Mr. McCune, all of whom you've met, and
12 Mr. Elihu of Quinn Emanuel, who I believe you have not
13 met. The people speaking today, principally, will be
14 Mr. Price, Ms. Sullivan and Mr. Cannon.

15 MR. HARRIGAN: Your Honor, just to complete the
16 introductions, I am here with Mr. Pritikin, Mr. Cederoth,
17 Mr. Wion, Mr. Cramer, and I believe Mr. Culbert from
18 Microsoft is also on the phone.

19 THE COURT: All right. Well, counsel, to the
20 extent that various people speak, I will ask you to
21 identify yourself before you start in. There is a
22 reporter back in Seattle who will be taking all of this
23 down, and he may not be as familiar with the voices as I
24 am.

25 So we have a not unlimited amount of time here, so I'm

1 just going to plunge right in. The first topic that I
2 would like to take up is exceptions to the preliminary
3 jury instructions. I do this so we can save a little bit
4 of time on Monday.

5 I will start with the plaintiff. Mr. Harrigan, does
6 Microsoft have any objections to the court's preliminary
7 jury instructions?

8 MR. HARRIGAN: Your Honor, we have a few
9 suggestions. Shall I just go through each one, or do you
10 want to deal with them one at a time?

11 THE COURT: If we are going to deal with them,
12 just do them all together.

13 MR. HARRIGAN: The first one has to do with
14 references to the hypothetical negotiations, which are at
15 Page 12, Line 6, and then down again at Line 16. Our
16 thought about that subject is that the concept of putting
17 a hypothetical negotiation in front of the jury has the
18 potential to be confusing. And we have two alternate
19 suggestions: One is to remove Lines 7 and 8, and parts of
20 Lines 15 and 16, where the hypothetical negotiation is
21 referred to, and simply start, "A RAND royalty rate is,"
22 and then, "I have concluded in a previous trial that the
23 RAND royalty rate 802.11 would have been." That's the
24 approach we think is preferable.

25 The alternative approach, we think, is to leave it as

1 it is, but explain the role of the hypothetical
2 negotiation. Because, given the issue in this case
3 that Motorola -- I mean, that Motorola's approach to this
4 case is, well, this all should have been a negotiation and
5 the letters are beside the point, we are concerned about
6 jury confusion.

7 So if there is going to be a reference to it, we would
8 request that the court explain that this was a method that
9 the court used to arrive at the rate, it is not something
10 that the court is saying the parties would have been doing
11 or should have been doing.

12 THE COURT: All right. Mr. Harrigan, I am going
13 to ask you, if you have proposed alternatives, to get
14 those to us before the close of business today. I would
15 make the same request of Motorola.

16 MR. HARRIGAN: The second one has to do with two
17 statements that the court made with regard to the breach.
18 And I'm going to start with the statement that the court
19 made at Page 13, Line 9 -- excuse me, Line 7, where you
20 say, "During the prior trial I did not examine whether
21 Motorola breached its commitments to provide Microsoft a
22 license to its standards-essential patents on RAND terms,
23 and I did not examine whether Motorola acted in good faith
24 with respect to those commitments." We have no problem
25 with that statement. I am merely pointing out that you

1 are describing two separate breach theories there, and
2 stating that you didn't decide either one.

3 Contrasting that with Page 5, Line 20, "The issue in
4 this case is breach of contract. Microsoft claims that
5 Motorola breached the IEEE and ITU contracts by violating
6 the covenant of good faith and fair dealing that is
7 implied in those contracts. Specifically, Microsoft
8 alleges that Motorola breached its duty of good faith and
9 fair dealing under the IEEE contracts by the following
10 actions."

11 So we would request that in both -- In this section
12 you also acknowledge that the claim of breach is a
13 flat-out breach of the RAND contract obligation, which is
14 potentially separate from the other breach, which is the
15 breach of the covenant of good faith and fair dealing.

16 THE COURT: All right. Any other comments?

17 MR. HARRIGAN: Yes. On Page 11, we think there is
18 a potential -- there is some potential confusion in the
19 Microsoft products section, Lines 10 to 14. "The primary
20 Microsoft products at issue in this case that use the
21 H.264 standard are Windows and Xbox. Windows is an
22 operating system for computers, Xbox is historically a
23 video game player, but now also plays video from," and you
24 mention "Hulu, Netflix and DVDs." And it seems to imply
25 that H.264 would be used in those products, but in fact

1 the court has found essentially that that is not the case.
2 And I can cite the findings. That is Findings 291, 266
3 and 292, where the court said, for example, "that DVDs use
4 MPEG 2 and not H.264." We would request that that
5 language be either eliminated or revised in some form so
6 as not to create the impression that H.264 is in those
7 products.

8 And then there is a typo at Page 5. It is starting at
9 Line 12, "On November 9, 2010, Microsoft filed its lawsuit
10 against Motorola, asserting, among other things, that
11 Motorola breached its contracts with IEEE and ITU by
12 contained in these letters." There is something, we don't
13 know what, omitted there that is needed for that sentence
14 to work. This looks like it was based in part on
15 Microsoft's proposed statement, which was, "Asserting,
16 among other things, that Motorola breached its contracts
17 with the IEEE and ITU by sending these demand letters." I
18 don't know what the court was intending there, but there
19 is an issue with the typo.

20 THE COURT: Mr. Harrigan, I am responsible for
21 that change. My problem with your proposed language was,
22 I don't think you have ever contended that sending the
23 letters was an improper act. I think what you have
24 contended is the content of the letters.

25 MR. HARRIGAN: I understand that issue. Your

1 Honor, we are not really making any specific request here,
2 other than there is obviously something left out, and
3 whatever you intended to put in there needs to be in
4 there. It just says "by contained in these letters." By
5 something contained in these letters.

6 THE COURT: Next.

7 MR. HARRIGAN: That's it. That's all we have on
8 the preliminary instructions, your Honor.

9 THE COURT: Mr. Palumbo, are you or Mr. Price
10 handling this one?

11 MR. PALUMBO: Ms. Sullivan is handling this one.

12 THE COURT: Ms. Sullivan.

13 MS. SULLIVAN: Good afternoon, your Honor.

14 Kathleen Sullivan for Motorola.

15 Your Honor, we have no quarrel with anything in your
16 proposed preliminary instructions whatsoever, with the
17 exception of one single addition that we proposed in
18 Docket 864, a letter we filed with you on August 22nd.
19 That is, we simply urge that on Page 11, at Line 8, that
20 you add a sentence that states, quoting your earlier
21 conclusions, "That under Motorola's contracts with the
22 IEEE and ITU (sic), Motorola did not need to make an
23 initial offer on RAND terms." That is the sole edit we
24 propose for the instructions.

25 MR. HARRIGAN: We had a response to that, which we

1 delivered today, I believe, your Honor, which is, if that
2 sentence goes in, we think it should -- the court's ruling
3 on that subject should be complete by adding, "But a
4 blatantly unreasonable offer is a breach of the duty of
5 good faith and fair dealing, and so a breach of the RAND
6 contract."

7 THE COURT: All right. Ms. Sullivan, it is your
8 turn to speak here. Can you give me the cite to where you
9 said you filed something earlier?

10 MS. SULLIVAN: Yes, your Honor. We filed a letter
11 on August 22nd, which is Docket 864.

12 THE COURT: Great. That's what I need. And,
13 Mr. Harrigan, did you docket your letter, or did you just
14 send it?

15 MR. HARRIGAN: It is Docket 865. It was filed
16 this morning at 10:00 a.m.

17 THE COURT: All right. Anything else on the
18 preliminary instructions?

19 MR. HARRIGAN: Not here, your Honor.

20 MS. SULLIVAN: Your Honor, Ms. Sullivan again. We
21 object to the addition of the language as quoted by
22 Mr. Harrigan, just because your Honor has not yet defined
23 the duty of good faith and fair dealing in your
24 preliminary instruction, and therefore we think it would
25 be confusing to add what is a breach of good faith and

1 fair dealing duty that you have not yet defined. So we
2 would object to the inclusion of the sentence with
3 Mr. Harrigan's additional language.

4 THE COURT: All right.

5 MR. HARRIGAN: Your Honor, we have no objection to
6 the court's defining the duty in the preliminary
7 instructions, if that would solve the problem.

8 THE COURT: All right. Counsel, if we make
9 changes to the preliminary instructions, which is likely,
10 because I think your comments were constructive, we will
11 give you a chance to take supplemental exceptions prior to
12 the jury arriving. So know that you will certainly have
13 that right.

14 For those of you that don't practice regularly in the
15 Ninth Circuit, and I'm not suggesting where this will all
16 end up, the Ninth Circuit has a rather stringent rule that
17 you need to identify with great particularity what it is
18 you don't like and why you don't like it, or else they
19 have a propensity not to consider an exception. Just know
20 that that is out there. These were very constructive
21 suggestions, and I thank you for them.

22 Number two on my list is the question -- is I would
23 like to know your position on the issue of whether the
24 jury should be allowed to keep the preliminary
25 instructions. I am authorized to go either way. I

1 normally do not do it, because I view the preliminary
2 instructions as sort of the operating manual for your new
3 appliance.

4 It seems to me, and you have heard me say this
5 repeatedly, we are going to have eight people who don't
6 know very much about this dispute, and we are asking them
7 to match wits with you, who have been involved in it in
8 some cases for years, if not decades. It may be helpful
9 if they have something to hold onto. I am going to ask
10 you also about your position on the glossary. That would
11 be another thing that I would allow them to hold onto.

12 So just to change this up, may I hear Motorola's view
13 on those two issues?

14 MR. PRICE: Yes, your Honor. This is Bill Price
15 talking. On the preliminary instructions, I don't think
16 the jury should keep those. It would tend to give weight
17 to some instructions over others, such as the instructions
18 you are going to give at the end of the case. It might
19 tend to give weight to some facts over others, because
20 they are going to be hearing facts throughout the trial,
21 but they are not going to get a list of those facts, even
22 though admittedly those facts haven't been determined. I
23 know there is going to be a lot for which there won't be
24 much dispute. So I think it might skew what the jury is
25 going to be looking at and listening to during the trial.

1 I would rather they, obviously, be given the instructions
2 and told what the court is going to tell them, and then
3 take that into consideration, just as they are going to be
4 taking into consideration the rest of the things they hear
5 throughout the trial.

6 With respect to the glossary --

7 THE COURT: Mr. Price, let me ask you this: Do I
8 cure that if I add the language that I think is in the
9 model instructions that says, "At the end of this case you
10 are going to be receiving final instructions, they
11 control," along with the language that says, "All
12 instructions are equal," and somehow make it clear that
13 the final instructions are what controls in this case?

14 MR. PRICE: Your Honor, I don't think so. I think
15 the reality of the psychology of the folks listening to
16 the trial is that they tend to kind of lean one way or the
17 other along the way. The thought of them having something
18 in their laps that has certain facts and not others, and
19 certain instructions and not others, that they can look at
20 for a period of a week, I think it is probably not correct
21 to assume that they are not going to give that more weight
22 than the later instructions or the facts as they are
23 developed throughout the trial, even though you tell them
24 at the beginning not to do that. I just think that is a
25 matter of the reality of how people make decisions.

1 THE COURT: All right. Speaking for Microsoft.
2 MR. HARRIGAN: Yes, your Honor. Art Harrigan.
3 Your Honor, as with many things in this case, we disagree.
4 I think the idea of this instruction is that it does
5 provide a guide to an area that is abstruse to most people
6 who have not dabbled in it before, and it would be more
7 useful if they don't just hear it and then it vanishes
8 without a trace for the rest of the trial. And I
9 concur -- I think that the approach to curing it is
10 appropriate.

11 Just to shortcut it, we feel the same way about the
12 glossary. It will be more helpful if they have it in
13 their hands.

14 THE COURT: Mr. Price, did you have any objection
15 to the glossary?

16 MR. PRICE: We have no objection to that, your
17 Honor, because I do think it is useful for them to be able
18 to flip through that so they can see what these acronyms
19 mean.

20 THE COURT: All right. My third question today
21 has to do with the jury questionnaire in voir dire. Let
22 me tell you what I now know from talking to the jury
23 coordinator and the in-court deputy. These folks
24 apparently arrive around 8:00, maybe a little bit earlier.
25 In lieu of the court's standard questionnaire, we are

1 going to give them your questionnaire, and they fill that
2 out. I have asked them to rearrange their procedures so
3 they are going to see Raymond Burr, or whoever plays Perry
4 Mason, in the video "Welcome to Jury Service" after they
5 have filled out that questionnaire. So you will not have
6 a long time to look at those jury questionnaires, but you
7 will have some time, particularly if you have a lot of
8 last minute matters that you want me to take up.

9 I am told that we send out a jury summons, and they
10 send back something acknowledging receipt of that. And on
11 there it asks questions like, "How far away from the
12 courthouse do you live?" which assists us if we need to
13 make hotel reservations for them, and, secondly, to
14 calculate how much they get for their per diem.
15 Apparently it also asks for their employment. Out of the
16 35 to 40 jurors, apparently three of them are Microsoft
17 employees. I have directed that they come in, because it
18 doesn't seem to me I have the power to strike them until
19 they say something. So know that out of your jury pool at
20 least three work for one of the parties. Apparently no
21 one wrote down that they or their spouse work for
22 Motorola. Just for your background, know that is what I
23 know on that subject at this time.

24 Are there any questions about the court's revisions of
25 the jury questionnaire? I think it is Microsoft's turn to

1 go first.

2 MR. HARRIGAN: No, your Honor, we don't have any
3 questions about that. I have a question about whether we
4 need permission to have a jury consultant at counsel
5 table.

6 THE COURT: You do not need to have permission,
7 although you do so at your own peril. O.J. Simpson has
8 made a definite impression on the jurors, and that is one
9 of the topics that comes up nearly every time I talk to
10 the jury after the trial.

11 MR. HARRIGAN: Can we agree that there would be no
12 mention of the presence of such a person?

13 THE COURT: Mr. Price, do you intend to mention
14 that?

15 MR. PRICE: No, your Honor, we do not intend to
16 mention that. We may have our own.

17 THE COURT: All right.

18 MR. HARRIGAN: Thank you.

19 MR. PRICE: Your Honor, this is Bill Price. The
20 only question I have, and maybe we can get some
21 clarification, is, I know you have said we will have some
22 time to review the jury questionnaires. Would it be
23 possible to at least give us a guarantee of like an hour
24 or so to look at those?

25 THE COURT: The answer for an hour is no, unless

1 you want to take it out of your trial time. As I
2 mentioned when we started this, jury selection is part of
3 the hours that are allocated in your trial time. I would
4 say there is a period of time in which I am going to ask
5 redundantly some of the questions that are on the
6 questionnaire, just to highlight for you who it is that
7 answered affirmatively. So in terms of practical time,
8 you are going -- depending on if you are allocating the
9 task to someone else, you will certainly have some time
10 during which you can examine the questionnaires, and also
11 make note of who it is that is responding affirmatively to
12 the questions.

13 MR. PALUMBO: Your Honor, this is Mr. Palumbo. In
14 terms of our planning for time, how do you allocate the
15 time that you spend asking questions during jury
16 selection?

17 THE COURT: It goes 50/50 to the parties. I am
18 doing that because -- You have a much more complete
19 questionnaire. Some of those questions I don't think I
20 need to ask. The first question in the bench book is,
21 "Have any of you heard about this case?" That one,
22 periodically, takes a lot of time, because I -- depending
23 on how many people raise their hand. What I don't want to
24 have happen is one person say, "Oh, yes, I went and
25 conducted an internet search on this case and do you know

1 that it has been mentioned in X number," and basically
2 start to poison the jury pool. The only way that you can
3 avoid that is to question them at sidebar one by one.

4 My guess is that there has been some publicity, but
5 not all that many people read the business section, and
6 not that many people read the Seattle Times anymore. I am
7 really not very comfortable in predicting what the
8 response will be to that first question. But that's an
9 example of something that seems to me better asked by me
10 than by you, and we will see what the response is going to
11 be.

12 Any questions about that?

13 MR. HARRIGAN: Not here, your Honor.

14 MR. PRICE: No, your Honor.

15 THE COURT: All right. Let me then turn to one of
16 the two highlights of today. This is going to address the
17 question of use of the findings of fact and the
18 conclusions of law. I have some extensive written remarks
19 which I'm going to read. And I do so because I recognize
20 that one of the parties has made this a centerpiece of our
21 preparation here.

22 Know that I will be filing a written order on this so
23 that you have a fixed target to shoot against. We hope to
24 do that early on. When you see that written order, it
25 will be adding some case cites, and whatever, which I

1 don't intend to do that now, unless I think you need to
2 know where I am pulling this stuff from.

3 This is in response to the question of what use can
4 the parties make of the findings of fact and conclusions
5 of law.

6 The court will now take up how the parties may use the
7 findings of fact and conclusions of law, which I will
8 shorthand call FFCL, from the November bench trial in this
9 case.

10 This question presents a unique legal issue, and it
11 appears there is limited precedent available to guide the
12 court's decision.

13 What the court has done, with the consent of the
14 parties, is take a single claim for breach of contract and
15 split that trial into two different phases, a bench phase
16 and a jury phase. As the parties are well aware, the
17 court issued a 200-plus-page findings of fact and
18 conclusions of law concerning the bench trial results.

19 Along the way, the court found numerous facts bearing
20 directly on the ultimate question of a RAND rate and
21 range. For example, the court made findings related to
22 the value of Motorola's patents, the extent of their
23 contribution to the standard, and the value of Microsoft's
24 products. This obviously was because the court could not
25 set a RAND rate or range in a vacuum; it was necessary to

1 understand Motorola's patents in context and to hear
2 testimony from experts on the value of those patents.

3 The individual findings of fact were the building
4 blocks of the court's ultimate RAND determination, and
5 without those building blocks the final determination
6 could not exist.

7 The question now before the court is how the findings
8 of fact and conclusions of law should be used in the
9 upcoming jury phase of the trial. The court has already
10 ruled, in deciding motions in limine, that the jury may
11 hear the RAND rate and range. This is not in dispute at
12 this point. The question now is whether the jury will be
13 permitted to hear the individual factual findings on which
14 the RAND rate and range are predicated; in other words,
15 whether the jury will be permitted to hear the building
16 blocks that made up the court's ultimate RAND
17 determination.

18 There are two overriding concerns with respect to this
19 issue. First, the court must protect the parties' right
20 to a jury trial where that right has been preserved. It
21 is clear that it would violate the Seventh Amendment if
22 the court, through its Findings and Conclusions, precluded
23 the jury from deciding factual questions on which the
24 parties preserve their jury trial rights.

25 However, it is equally clear that it does not violate

1 the Seventh Amendment for the court to decide factual
2 questions, and thus preclude the jury from deciding those
3 questions, where the parties have waived their right to a
4 jury trial.

5 This leads to the second major area of concern on this
6 issue: holding the parties to the commitments they have
7 made in this case and not allowing them to negate their
8 prior representations to the court.

9 The parties charted a course with this case that
10 included waiving their jury trial rights on certain
11 issues. It now appears that Motorola seeks to recant this
12 prior agreement, having not achieved its desired result it
13 hoped for in the first phase. The court must be mindful
14 not to allow the parties to re-litigate the issues that
15 they agreed to have the court decide, and the court did
16 decide, simply because a party does not like the court's
17 findings.

18 With these concerns in mind, the court now turns to
19 the central issue to be decided. There is no dispute that
20 the parties have waived some of their jury trial rights in
21 this case; thus, the critical issue is what is the scope
22 of the parties' waiver? This question can be answered in
23 one of two ways. First, one can argue that the parties'
24 waiver of their jury trial rights was narrow, in
25 accordance with how waivers of constitutional rights are

1 usually construed, and the parties only agreed to have the
2 court decide two issues, a specific RAND rate and a
3 specific RAND range for Motorola's standards-essential
4 patents. Motorola now takes this position.

5 Second, one could argue that the parties' waiver, even
6 narrowly construed, necessarily covered not only a RAND
7 rate and range, but also all of the factual predicates
8 necessary to determining a RAND rate and range. Microsoft
9 takes this position.

10 In the unique context of this case, and given the
11 parties' actions in the course of the litigation, the
12 court finds that the first proposition is unsupportable.
13 There are several reasons why this is true. First, the
14 parties' waiver of its jury trial rights does not seek to
15 strictly limit the waiver to only two narrow findings, and
16 does not attempt to preserve the parties' jury trial
17 rights with respect to the RAND issues decided in the
18 bench trial. In short, there is no indication that the
19 parties sought to restrict their jury trial waiver to only
20 a RAND rate and range to be given to the jury with no
21 factual context.

22 The parties' actions throughout this litigation
23 suggests that Motorola's position is not the correct one.
24 Motorola fully participated in the bench trial. Motorola
25 presented evidence on and vigorously disputed all of the

1 factual findings that it now claims should be kept from
2 the jury. Motorola presented extensive evidence on the
3 importance of the H.264 and 802.11 patent portfolios to
4 the respective standards and to Microsoft's products.
5 Additionally, Motorola presented evidence of the
6 importance of the standards to Microsoft's products.

7 Further, Motorola suggested, and the court adopted, a
8 modified Georgia-Pacific analysis as the framework for the
9 court's RAND determination, which placed at issue nearly
10 all of the facts which Motorola now wants to keep from the
11 jury.

12 At no point did Motorola attempt to prevent the court
13 from making the findings on the issue it now believes
14 violates the Seventh Amendment. In fact, Motorola
15 submitted 100 pages of proposed findings of fact and
16 conclusions of law on these issues, urging the court to
17 decide the very facts that it now seeks to exclude. At no
18 point did Motorola qualify those proposed findings or
19 attempt to preserve its rights to a jury trial with
20 respect to the facts it proposed to the court. All of
21 this behavior shows the court that Motorola's waiver is
22 not only of the RAND rate and range, but also of the
23 factual predicates necessary to determine that rate and
24 range.

25 Second, the parties' reasons for agreeing to a bench

1 trial in the first place favor Microsoft's position. The
2 parties agreed to hold a bench trial in part because this
3 case presents a lot of complicated technical issues. The
4 point of having a bench trial was to let the court sort
5 through Motorola's patents to determine what they were
6 worth and to spare the jury that task. It is not that the
7 bench phase and the jury phase were on separate issues.
8 There can be no doubt that the findings of fact made in
9 the bench trial were relevant to the ultimate questions of
10 breach of contract. Instead, the parties simply decided
11 that the judge, not the jury, could make the findings
12 because it could prove difficult for a jury. Indeed, the
13 court sympathizes with this view, having spent a
14 substantial amount of time on the FFCL.

15 The whole effort to spare the jury a difficult task
16 would be wasted if Motorola were now permitted to reargue
17 the court's findings at this point. The jury would be
18 asked to determine anew the facts already found.
19 Likewise, the effort would be wasted if the parties were
20 required to present evidence again to prove facts that
21 have already been proved once. The court cannot conclude
22 that this was the intent of the parties in waiving their
23 jury trial rights, nor does this viewpoint make any sense
24 from the context of this litigation.

25 And to be clear, this is not to suggest that concerns

1 about conserving resources somehow trumps the Seventh
2 Amendment. They do not. It is merely to demonstrate the
3 reasons why the parties agreed to waive the jury trial and
4 why the court should construe the waiver in harmony with
5 those reasons.

6 Third, during the bench trial the court took great
7 care to avoid deciding unnecessary factual issues in the
8 bench phase and directly implicated issues to be decided
9 in the jury phase. When such issues arose in the RAND
10 trial, and they appeared to wander into the jury's
11 territory, the court did not decide those issues.
12 Further, in crafting our findings and conclusions the
13 court was mindful not to include anything that would
14 infringe on Motorola's right to a jury trial on the breach
15 of contract issue.

16 Fourth, there is another important reason to reject
17 Motorola's position. Motorola's position is grounded in
18 the notion that they should be allowed to reargue the
19 court's factual findings to the jury, even though it
20 cannot re-argue the final RAND rate and range. This
21 cannot be. As stated above, the court's individual
22 findings of fact are the building blocks on the RAND rate
23 and range. If each of these building blocks could be
24 challenged in front of the jury, Motorola would in effect
25 be allowed a second bite at the apple on the RAND rate and

1 range. It is impossible to successfully challenge the
2 individual factual findings without undermining the
3 court's ultimate RAND conclusions. Allowing such
4 challenges would permit Motorola to have it both ways.
5 Motorola would get to argue the value of its patents to
6 the judge, and then if the judge disagreed with them,
7 Motorola could simply ask the jury to reach a different
8 result. That is not what the parties agreed to. The RAND
9 rate and range have been decided. The parties consented
10 to a bench trial, and they got one. The court will now
11 hold the parties to their commitments.

12 Finally, the parties sought to have the court
13 determine, broadly, the RAND portion of the case, and to
14 have the jury determine the breach of contract portion.
15 Quoting Mr. Harrigan: "In a nutshell, your Honor, the
16 parties agree that there is no jury involved, there is no
17 jury requirement with respect to the court's determination
18 of what is RAND, and the contract and so forth; and
19 disagree with respect to whether a jury would be required
20 to deal with the breach of contract part of the case."

21 The parties agreed to have the court determine, quote,
22 "all material terms of the RAND contract," unquote.

23 Quoting Mr. Palumbo: "That's right, your Honor. Our
24 agreement is the court would decide all of the material
25 terms of the RAND license. And we currently have a

1 disagreement with respect to whether the breach of
2 contract action should be tried by the court or by the
3 jury."

4 Further, the court has been clear throughout this case
5 that the purpose of the bench trial was to determine a
6 RAND rate for use by the jury in the second phase of the
7 trial. Quoting the court: "It seems to me what you're
8 really asking is what's going to happen in November. So
9 let me tell you what I think is going to happen in
10 November, and then I'm happy to hear from you. In
11 November, I expect us to try in a bench trial the RAND
12 terms for patents covered by ITU's standard H.264, and the
13 patents pertaining to IEEE 802.11. I understand from the
14 complaint, and from Motorola's offer letters of October
15 21, 2010 and October 29, 2010, that there are patents at
16 issue in what we call the 1823 litigation. That mostly is
17 a question of the royalty rate since that is what is
18 covered by your letters. In regards to the breach of
19 contract claim, that will not be tried at the November
20 trial date. As I have explained to you previously, my
21 reasons for that is the breach of contract, as Motorola
22 has admitted, exists in relation to the RAND rate. I
23 think Mr. Jenner's example was a million-dollar royalty
24 rate for one patent and the RAND rate turned out to be
25 15¢. Since I don't know what the RAND terms are yet, it

1 seems to me I can't deal with a breach of contract until
2 RAND is determined."

3 Indeed, Motorola preserved its jury trial right only
4 with respect to the breach of the issue of the duty of
5 good faith. Mr. Palumbo: "In answer to your question, we
6 have decided not to waive the jury trial on the breach of
7 the duty of good faith issue, and with respect to that
8 issue, we think -- we do agree that it is a triable issue
9 which the jury can determine. In other words, did
10 Motorola accord to its obligation to negotiate the
11 contract in good faith? We may have issues with respect
12 to whether the court can instruct the jury as to the
13 proper RAND rate, but we agree that it is a jury question
14 as to whether Motorola has conformed to its obligation to
15 negotiate a RAND license in good faith. So you would have
16 to decide, if you go forward, to actually set the terms of
17 the RAND license, you would need to decide only which
18 terms are material, and then what each of those material
19 terms would be."

20 The parties understood that the project of the court
21 would be to determine what the RAND terms are. Quoting
22 the court: "I will tell you that the operating assumption
23 of the court as to right now is that Motorola, when it
24 contracts for industry standard patent status, obligated
25 itself to make an offer on RAND terms for a license to the

1 patents that are covered, the H.264 and 802.11 patents;
2 that Microsoft has accepted that offer on RAND terms; and
3 what the court is doing is determining what those RAND
4 terms are."

5 Thus, the parties' waiver of their jury trial rights
6 does not support Motorola's position that it waived its
7 jury trial rights exclusively with respect to the RAND
8 rate and range and none of the other facts found in the
9 bench trial.

10 Accordingly, the court concludes that the scope of the
11 parties' jury trial waiver, even narrowly construed, must
12 include not only the RAND rate and range, but also all of
13 the factual predicates contained in the findings of fact
14 and conclusions of law that were necessary to determine
15 that rate and range. It will not violate Motorola's
16 Seventh Amendment right to allow the jury to hear the
17 court's factual findings.

18 The remaining question is how, from a mechanical
19 standpoint, the parties will be permitted to make use of
20 the findings and conclusions. This is subject to varying
21 approaches, but the court will now establish several
22 principles to guide the parties:

23 First, that the FFCLs will not be admitted in their
24 entirety.

25 Second, the court will not specifically instruct the

1 jury on a particular finding of fact, with the exception
2 of the RAND rate and range. Instead, the findings must
3 come in through witness testimony.

4 Third, conclusions of law in the court's orders may be
5 freely used and referred to.

6 Fourth, the use of the court's findings are subject to
7 Federal Rules of Evidence 401, 402 and 403. In
8 particular, the court is unwilling to allow the parties to
9 go into excessive detail about the specific nonessential
10 issues explored in the previous trial, and will exclude
11 attempts to do so under 403.

12 Fifth, if a witness testifies on direct examination
13 concerning a subject covered by the findings and
14 conclusions, and the underlying finding is challenged on
15 cross, the court will not permit evidence in an effort to
16 re-litigate that issue if the court has already decided
17 it.

18 Sixth, the parties should minimize the use of phrases
19 like, "Judge Robart says," and "the court has ruled." The
20 parties should also not attempt to improperly use the
21 imprimatur of the court to imply that the jury should
22 reach a certain result or view the evidence in a certain
23 way.

24 Seventh, witnesses may not simply read from the FFCL.
25 Instead, they must testify to the underlying facts, and

1 may, if necessary, use the court's finding as the basis
2 for those facts. As a corollary, counsel may not display
3 excerpts from the findings of fact and conclusions of law
4 to the jury using PowerPoint or any other display
5 mechanism. If a witness testifies to a fact contrary to
6 something contained in the findings and conclusions, the
7 opposing party may use the findings and conclusions to
8 impeach that witness.

9 Finally, the court will obviously entertain legitimate
10 objections to the use of the court's findings and
11 conclusions during the trial, and will address those
12 issues on a case-by-case basis. As I said, we are going
13 to be confirming that in a written order, which will be
14 available to you.

15 Turning then to -- It seemed helpful to have an
16 example to guide you. Microsoft filed at Docket 861
17 excerpts of the court's orders upon which Microsoft
18 intends to rely in Microsoft's opening statements. If you
19 look on Page 4 of that order, at Paragraph 289, to what
20 the court would believe to be acceptable, would be, taking
21 the language out of the Findings of Fact and Conclusions
22 of Law, 289: "Motorola's H.264 SEPS provide only minor
23 importance to the overall functionality of Microsoft's
24 Windows products. Windows, first and foremost, is an
25 operating system designed to permit various applications

1 to operate via a user. The Windows operating system has
2 vast functionality completely unrelated to any video
3 viewing. Only when a Microsoft Windows user chooses to
4 play interlaced video would Windows employ the
5 functionality of Motorola's H.264, which in turn only
6 provide a portion of the coding tools necessary to view
7 the interlaced video. Moreover, the interlaced video
8 would still play without Motorola's H.264, it might just
9 be five to eight percent slower."

10 Contrast that with Findings of Fact 533, which would
11 be, "The court concludes that Motorola's H.264 portfolio
12 only constitutes a sliver of the overall technology
13 incorporated in the H.264 standard." The remainder of
14 that finding and conclusion has to do with Telenor Group.
15 And it talks about what they did. It says, "Telenor
16 decided not to seek patents on its contributions, and
17 notified JVT of its decision."

18 That, in the eyes of the court, would not be an
19 appropriate use of the findings and conclusions, as it
20 does not have anything to do with the overall question of
21 breach of contract.

22 So, I offer those as examples to help you with how to
23 approach this issue.

24 You all created a controversy, as exemplified in
25 Mr. Harrigan's August 20 letter dealing with the

1 defendant's revised proposed preliminary instructions. It
2 says, "Motorola's submission does not contain stipulated
3 facts." The court believes that the only stipulated facts
4 in this matter are found in your pretrial order on Page 5.
5 It is entitled "admitted facts." It says, "facts to which
6 all the parties agree." Short of that, I see nothing that
7 each of you has submitted that says both of you agree as
8 to anything. So know that is our operating assumption as
9 to where you are in terms of stipulated facts.

10 That was a long section of me talking. Mr. Price, I
11 think you are up first on this one. Any questions in
12 regards to the court's ruling?

13 MR. PRICE: No questions, your Honor. We
14 obviously look forward to (phone malfunction) --

15 THE COURT: I'm sorry. You cut out on me there.

16 MR. PRICE: I'm sorry. We have no questions, your
17 Honor. We obviously look forward to seeing it in writing
18 so we can give it the attention it deserves.

19 THE COURT: Thank you. Mr. Harrigan.

20 MR. HARRIGAN: Yes, your Honor. I have a couple
21 of questions. First of all, I just want to make sure I
22 understood your examples. So with regard to 533, what I
23 believe you said was the first sentence about the "sliver"
24 is appropriate, and the rest of that is not?

25 THE COURT: A witness will be able to testify to

1 it. You don't get to put it up as a PowerPoint
2 presentation.

3 MR. HARRIGAN: I understand. Let me just give you
4 an example. Maybe this will help us to make sure we
5 understand. If we put Mr. Glanz on, the approach I was
6 thinking that would be efficient is, rather than have him
7 reiterate everything he said in an hour in the last trial,
8 to use the court's findings with regard to what happened
9 with MPEG LA and Motorola's approval of rates, and so
10 forth, and then have him simply give a little context to
11 it, with the idea that we could cover this in 20 minutes
12 instead of 45 minutes to an hour. And I was contemplating
13 that I would read to him during his testimony maybe five
14 of the court's findings on the subject of MPEG LA, and he
15 would put them in a little bit larger context for the
16 jury. You said that the witness could testify from the
17 findings, but I'm not sure whether the lawyers are allowed
18 to read them into the record as part of the witness'
19 testimony. Is it that the witness should refer to the
20 findings and quote from them, and then explain some of the
21 context? In other words -- I am babbling a little bit
22 here, but I am just trying to figure out what the right
23 approach is.

24 THE COURT: You're not going to be able to read
25 them to him and say, "Is that a finding?" That is not a

1 proper bit of evidence. He is not going to be permitted
2 to say, the court found in finding such and such, and then
3 recite what that is. If he is competent to state the
4 area, he can say, this is MPEG 2, this is what happened in
5 MPEG 2, this was the ultimate conclusion of MPEG 2. If he
6 is assaulted on cross-examination, and they say that can't
7 possibly be right, he would be permitted to say, you know,
8 the court found in its prior order what I have just
9 testified to. But you have to put these findings and
10 conclusions into evidentiary form. You don't simply get
11 to put them up there under limited or no context, because
12 at that point you are converting the court into a witness,
13 which I don't believe is proper under the circumstances.

14 MR. HARRIGAN: Would Mr. Glanz be able to use the
15 court's findings to -- In other words, the thing I am
16 concerned about is that it sounds as though we would be in
17 effect re-presenting the evidence that underlies the
18 court's findings, which I thought I understood from your
19 other remarks is something that you want to avoid. And so
20 it is unclear to me how we get the finding into evidence
21 if the witness can't read it, we can't read it and we
22 can't put it up on a screen. How do we use the findings
23 to get this trial done in the amount of time that we have
24 available?

25 THE COURT: That's why they are paying you the big

1 bucks, to figure that out. He is not going to get to say,
2 my testimony is the court found at Finding 581 such and
3 such. He can say the substance of the findings, you know,
4 what happened in MPEG.

5 MR. HARRIGAN: I think I get it. I take it the
6 jury is never going to actually see or hear these
7 findings; is that right?

8 THE COURT: They are going to hear and see the
9 finding on rates and range, and they are going to hear
10 testimony from witnesses; and if the witness is
11 cross-examined in regards to the accuracy of that
12 testimony, they are going to be able to ultimately say,
13 this was previously determined by the court and that's why
14 I believe this is what happened.

15 There seems to be some stunned silence. Does that
16 mean that I can move on?

17 MR. HARRIGAN: I guess, your Honor, we are a
18 little bit puzzled by how we are going to get this done in
19 the available time. I guess we will just have to figure
20 that out. Assuming that the court was going to adhere to
21 your original view, that the findings were verities, and
22 the jury in effect wasn't going to have to revisit them,
23 our operating assumption in getting ready for trial was
24 that we didn't have to re-prove the findings, and we could
25 in effect use them in some form. But it sounds like you

1 have excluded all of the forms in which we thought we
2 potentially could use them. I am just a little puzzled
3 about how we avoid retrying the case.

4 THE COURT: I would urge you to retry the case on
5 the breach of contract question and not on the RAND rate
6 question. That's the original distinction that we had. I
7 have read your -- the excerpts that were going to be used
8 as part of the opening statement, and I simply don't think
9 that many of them have anything to do with the breach of
10 contract.

11 MR. HARRIGAN: Right. We may have been
12 overinclusive. But, for example, the issue of whether
13 Motorola's patents are a sliver of either of the two
14 standards, obviously as it bears on the good faith issue
15 it bears on whether Motorola was frustrating the purpose
16 of RAND because of stacking and so forth. I mean, we
17 would have to call an expert from the prior trial to
18 testify that they were a sliver. And we were of the
19 understanding that the court, having gone through an
20 enormous amount of analysis to reach that one-sentence
21 conclusion, that we would be able to present that finding
22 and not go back through the analysis that created it.

23 THE COURT: I don't want you to go back through
24 the analysis that created it. You are going to be able to
25 allow your witnesses to testify that this is a very large

1 standard, it has a lot of stuff in it, it went through an
2 extended and complicated process to be created, and that
3 Motorola's patents are but a sliver of it. That's what
4 the court found, and that's what I understand you are
5 presenting testimony about.

6 Are we going to go back and talk about the particular
7 value of interlaced video? No. We are trying a breach of
8 contract case, we are not retrying the RAND rate case.

9 MR. HARRIGAN: I think I get it.

10 THE COURT: Good. Let me move on to Marvell then.
11 Once again, this is going to be one where we are going to
12 give you a written order. But much to the disappointment
13 of the blogosphere, I am not going to wade into the
14 question of exhaustion, particularly in this trial.

15 Once again, this is one where the court will give you
16 a written order so that you know my thinking on this.

17 The law is well established that an authorized sale of
18 a patent product places that product beyond the reach of
19 the patents. The patent owner's rights with respect to
20 the product end with its sale, and a purchaser of such
21 products may use or resell the product free of the patent.
22 This longstanding principle applies similarly to a sale of
23 a patented product manufactured by a licensee acting
24 within the scope of its license.

25 I am omitting the case cites that go along with this

1 since I'm sure you all know them by heart.

2 In Honeywell, over the dissent of Judge Mayer, the
3 Federal Circuit reversed a finding that patent rights were
4 exhausted to the accused systems sold by the plaintiff at
5 a time before the plaintiff had merged with the holder of
6 the patent, the majority ruling that there was no
7 authorized first sale. And then it has a quote about,
8 "For the first sale doctrine to apply, there must be an
9 authorized first sale."

10 In other words, courts examining the question of
11 exhaustion look to the license agreement, typically
12 between the patentee and licensee, to determine whether a
13 sale of a licensed product was authorized by that
14 agreement. For example, in Quanta, cited by the parties
15 in their briefing on the exhaustion issue, the court
16 examined the scope of the license between Intel and LGE.
17 The court found that, "Nothing in the license agreement
18 restricts Intel's right to sell its microprocessors and
19 chipset to purchasers who intend to combine them with
20 non-Intel parts. It broadly permits Intel to make, use,
21 or sell products free of LGE's patent claims." The Quanta
22 court then found: "Because Intel was authorized to sell
23 its products to Quanta, the doctrine of patent exhaustion
24 prevents LGE from further asserting its patent rights with
25 respect to the patents substantially embodied by those

1 products."

2 As another example, in Cook, Inc. versus Boston
3 Scientific, the court examined license agreements between
4 the patentee and the licensee, and determined that the
5 doctrine of exhaustion did not apply because the license
6 agreement prohibited the downstream assignment to a third
7 party, such that the third party could not make the
8 requisite first sale of the patented product." See also
9 Intel versus ULSI System Technology.

10 In that case it is examining the specifics of the
11 license agreement between Intel and Hewlett Packard to
12 determine if HP's sale of the 'C87 coprocessors were
13 insulated by the doctrine of exhaustion from Intel's claim
14 of infringement because they were sold by ULSI to HP,
15 which was authorized to do so under the license agreement
16 with Intel.

17 Here, Microsoft asked the court to set forth a jury
18 instruction that a presumed license agreement between
19 Motorola and Marvell for Motorola's 802.11 SEPs would act
20 to exhaust Motorola's patent rights against Microsoft.
21 Motorola states, citing Quanta, "that a RAND license
22 agreement granted by Motorola to Marvell would broadly
23 permit Marvell to make, use or sell products free from
24 Motorola's patent claims, because Motorola's RAND license
25 agreement bars it from imposing any conditions limiting

1 Marvell's authority to sell products substantially
2 embodying the patent."

3 First, as explained above, Quanta examined a specific
4 license agreement and determined that the license
5 agreement between Intel and LGE permitted the sale of
6 patented products. The holding of Quanta was specific to
7 the license agreement at issue in that case.

8 Second, Quanta does not in any way deal with the RAND
9 commitment, as Microsoft suggests.

10 The bottom line here is that each license agreement is
11 specific, and whether or not the downstream sale is
12 authorized by the license agreement between the patentee
13 and the licensee is dispositive of authorization and thus
14 whether the exhaustion doctrine applies. Here, we do not
15 have a Motorola-Marvell license agreement. Although it is
16 likely, we do not know if Marvell is a third-party
17 beneficiary from Motorola's RAND commitment. Microsoft is
18 asking the court to make a contractual determination of a
19 license agreement that does not exist. The court will not
20 issue such an advisory opinion.

21 Alternatively, Microsoft would ask the court to set
22 forth a rule of law that a RAND commitment requires
23 licenses free of downstream restrictions. The court
24 cannot do that in this case because there is simply an
25 insufficient record. The requirements of the RAND

1 commitment on licensing agreements is an open question at
2 this point, and the numerous questions of law, some of
3 which have been briefed, some not, do not need to be
4 resolved in this case; for instance, is a defensive
5 suspension clause proper in a RAND license; what is the
6 proper scope of a defensive suspension clause; does the
7 RAND obligation require RAND licenses that will cover all
8 downstream customers, or may restrictions be imposed on
9 sales.

10 The Marvell issue has been in this case for a while,
11 but there is no briefing that answers the open question of
12 the RAND commitment's legal operation in potential
13 licensing agreements between a SEP holder and licensees.
14 Thus, the court cannot issue a jury instruction construing
15 the law regarding a hypothetical Motorola-Marvell license
16 and the effect of this hypothetical license on Motorola's
17 ability to seek royalties from Microsoft.

18 The result is that Microsoft cannot make this argument
19 to the jury, that had Motorola given the license to
20 Marvell, Motorola could no longer seek royalties from
21 Microsoft.

22 This does not mean, however, that Microsoft cannot
23 introduce evidence regarding Motorola's conduct vis-a-vis
24 Marvell, because such evidence is still relevant to
25 Motorola's good faith or bad faith. Microsoft simply may

1 not connect the dots and state a Motorola-Marvell license
2 would preclude Motorola from seeking royalties from
3 Microsoft, because such an argument turns on legal grounds
4 which do not exist.

5 This will be greatly disappointing to all of those law
6 firms who have been publishing things in the last couple
7 of weeks, saying, oh, boy, we are looking forward to
8 having a resolution of these issues. I don't see how I
9 can do that, given the state of the record here, when we
10 do not have a license, and therefore we don't know the
11 terms of it.

12 Mr. Harrigan, I think you are first this time. Any
13 question about the court's ruling on Marvell?

14 MR. HARRIGAN: No, your Honor.

15 THE COURT: Mr. Price?

16 MR. PRICE: No questions, your Honor.

17 THE COURT: All right. Moving right along then.
18 The court received either a phone call or an e-mail, I'm
19 not sure which, late last night, saying: Here are some
20 miscellaneous items. We have covered the glossary. Will
21 the court approve an agreement of calling witnesses only
22 once?

23 The answer is yes.

24 And, finally, there would be some miscellaneous
25 matters that might need to be sealed, and the example

1 given was attorneys' fees. Be mindful of the Ninth
2 Circuit's presumption against sealing anything other than
3 a trade secret. I don't think that attorneys' fees rates
4 are probably a trade secret. I will keep an open mind on
5 it, but if I were asked to rule on that at the present
6 time, I would say we would not be sealing that.

7 Motorola asked: May we use video depositions in
8 openings?

9 I have made rulings on all of your objections. The
10 other side needs to know in advance what you are going to
11 use, but I guess I have permitted videotaped deposition
12 excerpts to be used.

13 And then there were some questions about time
14 allotment. If I come out and say an issue has arisen, and
15 I ask for comments from both of you, that usually gets
16 allocated 50/50. If a party raises an issue, and they are
17 the only ones that argue, it gets charged to them. I
18 don't divide that 50/50. I will go by the actual time
19 that each side uses.

20 Are there any other miscellaneous matters that you
21 would like to take up today?

22 MR. HARRIGAN: Your Honor, I have one question,
23 which I think we all reached an understanding about this
24 subject at our last meeting with the court. But
25 specifically with reference to Mr. Dailey, a Motorola

1 witness who testified at the last trial, we plan to call
2 Mr. Dailey in our case. We understand that we had agreed
3 that that meant that Motorola would do their full direct
4 for their case during our case; and to the extent there is
5 an issue regarding rebuttal, any recalling of Mr. Dailey
6 for rebuttal would be strictly limited to new material
7 that came up after he testified in our case. I just want
8 to make sure we are all on the same page on that.

9 THE COURT: That's what I understood the agreement
10 was. Mr. Price? Ms. Sullivan?

11 MR. PRICE: Your Honor, this is Bill Price
12 talking. Yes, if Mr. Dailey is called in plaintiff's
13 case, we would do our full examination. Obviously we
14 would not recall him unless we made some showing that
15 something happened that could not have been reasonably
16 anticipated, like if a witness comes forward and says,
17 Mr. Dailey said he had voodoo dolls of Microsoft
18 executives, we think we should be able to come back and
19 say, no, he didn't.

20 One thing I wanted to alert you to that just occurred
21 to me, your Honor, that given your ruling today,
22 particularly on the use of the court's order, we may want
23 to have a few moments to reexamine whether we are going to
24 have Mr. Dailey here for the first part of the case. We
25 just need to think about that now that I have a clear

1 understanding of how your order is going to be used in the
2 examination of witnesses.

3 THE COURT: Where does Mr. Dailey reside?

4 MR. PRICE: He is in Chicago, your Honor.

5 THE COURT: Here is my concern: I don't want
6 Microsoft to be disadvantaged and I don't want Motorola to
7 be disadvantaged. If the assumption has been that he was
8 going to be here and therefore they didn't need to
9 designate his testimony or whatever, and now all of a
10 sudden you are saying, well, we might not have him appear
11 at the start, that's not going to fly well with me. You
12 need to live up to those commitments. On the other hand,
13 I applaud both of you. Juries really don't get why
14 witnesses are called and recalled. They find that very
15 confusing.

16 MR. PRICE: Your Honor, I understand exactly what
17 you are saying. Microsoft has already designated
18 Mr. Dailey's deposition testimony. The question is
19 whether or not we don't have to deal with that because he
20 is going to be live. And we represented to the court that
21 in fact was what we were going to do, is have him
22 available live. I am just saying, given the court's
23 order, I just need time to think about whether or not we
24 still want to do that, and whether or not -- Of course,
25 we would have to have the court's permission to change

1 that. I understand that. But Microsoft has already
2 designated deposition testimony of him in case he was not
3 going to be available.

4 MR. PRITIKIN: Your Honor, this is David Pritikin.
5 We were told last week, I think, that Mr. Dailey was going
6 to be their corporate representative, meaning that he
7 would be present through the entire trial. It was
8 Motorola that had asked that we call him in our case so
9 that we could avoid having to call him twice. There are
10 various pieces of testimony he has given before, some of
11 it is the trial transcript from the trial last fall, some
12 of it is the trial transcript from the International Trade
13 Commission. There are no videos of this. What it would
14 entail, if they decide he is not going to be the corporate
15 representative now, and they are going to absent him from
16 the jurisdiction, we would have to actually read all this
17 stuff to the jury, and then I guess they are going to
18 bring him in later in the week to testify in their case.
19 It seems to me, based on where we are now, they ought to
20 just bring him in and let us question him as we intended
21 to do in our case.

22 THE COURT: Have I reviewed the objections to any
23 of this material?

24 MR. HARRIGAN: Your Honor, I believe you have. I
25 believe you have. I want to double-check that. But

1 | that's my recollection.

2 MR. PRICE: Your Honor has ruled on those
3 designations.

4 THE COURT: Mr. Price, you can think about it, but
5 if your answer is anything other than he is showing up, I
6 may well order him to appear. It seems to me we are kind
7 of down the road here a bit and people have relied on
8 prior representations. It is not to suggest anyone did
9 anything wrong, but people make trial plans, and I think
10 that we want to try and honor those.

11 MR. PRICE: I understand, your Honor. I'm sorry.
12 I didn't mean to interrupt you. I understand that. I
13 would make my position clear by the end of the day, in
14 case we do need to discuss the issue further.

15 THE COURT: All right. That may be a potential
16 matter for Monday morning, but tell him to keep a bag
17 packed.

18 | MR. PRICE: I will.

19 THE COURT: Counsel, anything else at this time?

20 MR. HARRIGAN: Not here, your Honor.

21 | MR. PRICE: Not here, your Honor.

22 | MR. PALUMBO: Thank you.

23 THE COURT: Bye-bye.

24 | **(Adj)**

25

1 **CERTIFICATE**
2
3
4
5
6
7
8

I, Barry L. Fanning, Official Court Reporter, do hereby
9 certify that the foregoing transcript is true and correct.

10
11 S/Barry L. Fanning

12 Barry L. Fanning
13
14
15
16
17
18
19
20
21
22
23
24
25